



September 11, 2000

Ms. Angela Washington
Cowles & Thompson
901 Main Street, Suite 4000
Dallas, Texas 75202-3793

OR2000-3491

Dear Ms. Washington:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 138756.

The City of Rowlett (the "city"), which you represent, received a request for five items of information relating to the interviews conducted by Janet Collinsworth, P.C., on behalf of the city, regarding a performance review of a golf course project. You claim that the requested information is excepted from disclosure under sections 552.101, 552.103, 552.107, 552.111, and 552.117 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that you have informed the requestor that no responsive documents exist which relate to item four of the request and that the responsive invoice to item three of the request was initially incorrect and the city has yet to receive a revised version of the invoice at the time the city made this request to this office. The Public Information Act (the "Act") does not require a governmental body to prepare new information in response to open records requests. Open Records Decisions Nos. 452 (1986), 342 (1982). Furthermore, the Act does not ordinarily require a governmental body to obtain new information to comply with a request. Open Records Decision 561 (1990). The Act only applies to information already in existence. In this instance it appears the city does not have the requested information responsive to item four or the invoice responsive to item three of the request. Therefore, the city need not create any new documents to respond to the request for the invoice in item 3, or to item four of the request.

We also note that you assert portions of the submitted records, Bates Nos. AG 00144 - AG 00324 and Bates Nos. AG 00435 - AG 00525, contain handwritten notes by private citizens and therefore these notes are not public documents. Section 552.002 of the Government Code defines public information as "information that is collected, assembled or maintained

under a law or ordinance or in connection with the transaction of official business by a governmental body or for a governmental body and the governmental body owns the information or has a right of access to it." Gov't Code §552.002. The city obtained these handwritten notes in connection with the transaction of official business, the review of the golf course project. These documents that contain the handwritten notes are clearly maintained by the city, as the city submitted the documents as responsive to the present request. Accordingly, these documents fall within the purview of section 552.002. Therefore, we will address whether the city's claimed exceptions apply to these documents, as well as, the remainder of the submitted information.

The city claims that the submitted information is excepted from public disclosure under section 552.103 of the Government Code. Section 552.103(a) excepts from disclosure information relating to litigation to which a governmental body is or may be a party. The governmental body has the burden of providing relevant facts and documents to show that section 552.103(a) applies. To show that section 552.103 is applicable, the city must demonstrate that 1) litigation is pending or reasonably anticipated and 2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479 (Tex. App. -- Austin, 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.-- Houston[1st Dist] 1984, writ ref'd n.r.e.); Open Records Decision No. 588 (1991).

Section 552.103 requires concrete evidence that litigation may ensue. To demonstrate that litigation is reasonably anticipated, the city must furnish evidence that litigation is realistically contemplated and is more than mere conjecture. Open Records Decision No. 518 at 5 (1989). The mere contemplation of future litigation by a governmental body is not sufficient to invoke section 552.103. *See* Open Records Decision No. 557 at 6 (1990). After reviewing the information, we conclude that the possibility of litigation is one of several avenues of action that the city may take in resolving the present issue. We conclude that, from the face of the submitted documents, the city is still working to resolve this matter. Therefore, we find that the city is merely contemplating future litigation. Accordingly, the city may not withhold the submitted documents under section 552.103 of the Government Code.

You also claim that portions of the submitted documents are excepted from disclosure under attorney work product pursuant to section 552.101. Section 552.101 does not incorporate the attorney work product privilege. *See* Open Records Decision No. 575 (1990). Attorney work product is properly claimed under section 552.103 or section 552.111. Open Records Decision No. 647 (1996). As discussed above, we do not find section 552.103 applicable to the submitted documents. Therefore, we will determine whether section 552.111 excepts the submitted documents from public disclosure as attorney work product.

This office has stated that if a governmental body wishes to withhold attorney work product under section 552.111, it must show that the material 1) was created for trial or in anticipation of litigation under the test articulated in *National Union Fire Insurance Co. v. Valdez*, 863 S.W.2d 458 (Tex.1993), and 2) consists of or tends to reveal an attorney's mental processes, conclusions, and legal theories. *See id.* When showing that the documents at issue were created in anticipation of litigation for the first prong of the work product test, a governmental body's task is twofold. The governmental body must demonstrate that 1) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that litigation would ensue, and 2) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and conducted the investigation for the purpose of preparing for such litigation. *See id.* at 5. Based on your arguments and our review of the documents, we conclude that you have not demonstrated that the documents were prepared in anticipation of litigation. Additionally, we find that the information does not consist of or reveal an attorney's mental impressions, conclusions, or legal theories. Therefore, we find that the requested information does not fall within the attorney work product privilege encompassed in section 552.111 of the Government Code. Consequently, the city may not withhold the submitted information under section 552.111 and the attorney work product privilege.

Additionally, you claim that portions of the submitted records are excepted under section 552.111 as the documents represent intraagency memoranda. Section 552.111 excepts from disclosure "[a]n interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." In Open Records Decision No. 631 (1995), this office determined that section 552.111 of the Government Code may apply to information created for a governmental body by an outside consultant when the outside consultant is acting at the request of the governmental body and performing a task within the authority of the governmental body. Open Records Decision No. 631(1995). You state that Janet Collinsworth, P.C. ("JCPC") was hired by the city to perform the review at issue. You state that JCPC was acting at the request of the City Council. You further state that the Council has the authority to order a performance review of any city project; thus, JCPC was performing a task within the authority of the governmental body. After reviewing your arguments and the submitted information, we conclude that the documents at issue were not created by the consultant, JCPC. We find that these documents were provided to JCPC by city employees. Therefore, as we find these documents were not created by JCPC, we conclude that, pursuant to the rationale in Open Records Decision No. 631(1995), section 552.111 is inapplicable to these documents.

Furthermore, you assert that the handwritten notes on some of the submitted documents contain advice and opinions that are excepted from public disclosure under section 552.111. In Open Records Decision No. 615 (1993), this office reexamined the predecessor to the section 552.111 exception in light of the decision in *Texas Department of Public Safety v.*

Galbreath, 842 S.W.2d 408 (Tex. App.-- Austin 1992, no writ), and held that section 552.111 excepts only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. In this instance, we find that the handwritten notes on the submitted documents do not contain advice, opinions, or recommendations. Therefore we conclude that the handwritten notes may not be withheld under section 552.111 of the Government Code.

The city also claims that portions of the submitted information are excepted from public disclosure under section 552.107(1). Section 552.107(1) excepts information that an attorney cannot disclose because of a duty to his client. In Open Records Decision No. 574 (1990), this office concluded that section 552.107(1) excepts from public disclosure only "privileged information," that is, information that reflects either confidential communications from the client to the attorney or the attorney's legal advice or opinions; it does not apply to all client information held by a governmental body's attorney. *Id.* at 5. When communications from attorney to client do not reveal the client's communications to the attorney, section 552.107(1) protects them only to the extent that such communications reveal the attorney's legal advice. *Id.* at 3. In addition, basically factual communications from attorney to client, or between attorneys representing the client, are not protected. After reviewing the submitted documents, we find that a memorandum, Bates Nos. AG 00140-00143, from the city attorney is excepted from public disclosure under section 552.107(1). The city must withhold this memorandum from public disclosure under section 552.107(1). We have marked the document to be withheld.

Finally, we note that the submitted documents may contain telephone numbers of city employees. Section 552.117(1) excepts a public employee's home address, home telephone number, or social security number, or information that reveals whether the employee has family members when the public employee requests, under section 552.024, that this information be kept confidential. Therefore, section 552.117(1) requires you to withhold this information of a current or former employee or official who has elected under section 552.024 to keep this information confidential. *See* Open Records Decision Nos. 622 (1994), 455 (1987). You may not, however, withhold the information of a current or former employee who made the request for confidentiality under section 552.024 after this request for information was made. Whether a particular piece of information is public must be determined at the time the request for it is made. Open Records Decision No. 530 at 5 (1989). Therefore, if the city employees made the proper section 552.024 election prior to the date of this request, then the city must withhold this information pursuant to section 552.117(1). Otherwise, the city must release this information to the requestor.

In summary, the city must withhold the employees' home telephone numbers that appear in the submitted documents under section 552.117(1), if the employees made the proper 552.024 election prior to the date of this request. The city must withhold the marked

memorandum under section 552.107(1). The city must release the remainder of the submitted documents to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

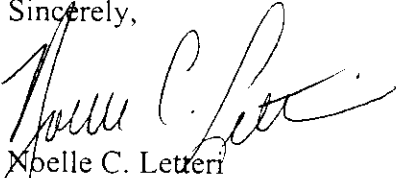
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "Noelle C. Letteri", written over the printed name.

Noelle C. Letteri
Assistant Attorney General
Open Records Division

NCL/pr

Ref: ID# 138756

Encl. Submitted documents

cc: Mr. Mike Gibson
7201 Shipp
Rowlett, Texas 75088
(w/o enclosures)